IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 392

IN THE MATTER OF: THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

Debtor.

WALTER E. MEYER,

Petitioner,

vs.

JOSEPH B. FLEMING AND AARON COLNON, AS TRUSTEES OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

Respondents.

BRIEF FOR PETITIONER

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The Opinions of the Courts Below

The opinion of the Circuit Court of Appeals (R. 61-65) is reported in 149 F. (2d) 529.

The opinion of the District Court (R. 49-52) is not reported.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code [28 U. S. C. A. 347 (a)], as amended.

The judgment of the Circuit Court of Appeals was entered on June 6, 1945 (R. 66).

The petition for a writ of certiorari was filed on August 31, 1945, and certiorari was granted on October 22, 1945.

Statute Involved

The statute involved is Section 77 of the Bankruptcy Act, and particularly subsections (a), (c)(2) and (*l*) thereof [11 U. S. C. A. 205 (a), (c)(2) and (*l*)]. The pertinent language of said subsections is printed in the Appendix, pages 38-39 hereof.

Statement of the Case

Your petitioner, a stockholder and at the time a director of St. Louis Southwestern Railway Company (hereinafter referred to as "St. Louis Southwestern"), on April 26, 1934, filed a claim for the benefit of St. Louis Southwestern in proceedings under Section 77 of the Bankruptcy Act for the reorganization of The Chicago, Rock Island & Pacific Railway Company (hereinafter referred to as "Rock Island" or "debtor") instituted in the District Court of the United States for the Northern District of Illinois, Eastern Division (R. 2).

The claim is in the amount of $31,593,874, $29,126,874 being for damages arising out of successive conspiracies in which Rock Island was alleged to have participated, by which St. Louis Southwestern was controlled from March 11, 1925, to June 7, 1933, the date of the initiation of the Rock Island reorganization proceedings, in breach of the fiduciary relationship those in control were in to St. Louis Southwestern and in violation of the antitrust laws. Rock Island is also asked to account to St. Louis Southwestern for profits in the amount of $2,467,000 realized in its purchase of a dominant stock interest in St. Louis Southwest-

ern in violation of the Clayton Act and the subsequent sale of such interest to Kansas City Southern, by which Kansas City Southern was caused to violate the Clayton Act (R. 2-7).

The claim was filed by petitioner in behalf of St. Louis Southwestern because at that time Southern Pacific Company controlled St. Louis Southwestern, and Southern Pacific Company and the directors of St. Louis Southwestern were co-conspirators with Rock Island in connection with the conspiracies by which St. Louis Southwestern was damaged (R. 3).

The trustees of Rock Island, respondents herein, on May 25, 1935, filed objections in the nature of a general denial of the said claim (R. 7).

On December 12, 1935, a year and a half after the filing of the claim, St. Louis Southwestern filed a petition for reorganization, under Section 77 of the Bankruptcy Act, in the United States District Court for the Eastern Judicial District of Missouri, Eastern Division. The Court approved the petition, and on January 3, 1936, appointed a trustee for the company (R. 51).

Among the objections filed thereafter by the respondents was the objection that petitioner could no longer prosecute the claim because, by reason of the reorganization proceedings and the appointment of a trustee of St. Louis Southwestern, title to the causes of action set forth in said claim became vested in that trustee (R. 8).

The trustee of St. Louis Southwestern has made no step to take over the claim or to enjoin its prosecution by petitioner, nor have the respondents alleged that he has done so.

The claim having been referred to a Special Master, respondents and petitioner requested that the Special Master, before entering upon a hearing on the merits, first dispose of the objection of the respondents which raised

the issue of petitioner's right to further prosecute the claim (R. 34, 50).

On February 2, 1942, the Special Master filed his report (R. 34-44) and supplemental report (R. 44-47), finding and concluding that petitioner should not be allowed to prosecute the claim.

On February 7, 1944, the District Court entered its order approving the reports of the Special Master (R. 49-52), and on June 6, 1945, the Circuit Court of Appeals affirmed the order of the District Court (R. 61-66).

The Circuit Court of Appeals held that after the institution of reorganization proceedings and the appointment of a trustee of St. Louis Southwestern petitioner could no longer prosecute the claim. It based its decision, as had the District Court, on subsections (a) and (c)(2) of Section 77 of the Bankruptcy Act (R. 63).

Subsection (a) provides that the reorganization court shall have "exclusive jurisdiction of the debtor and its property wherever located" and "in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a Federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose."

Subsection (c)(2) confers upon the trustee in a Section 77 proceeding the title and powers of a trustee "appointed pursuant to Section 72 or any other section of this title [11 U. S. C. A.], and, to the extent not inconsistent with this section, if authorized by the judge, the powers of a receiver in an equity proceeding."

The Circuit Court was of the opinion that "the continuance without court permission" of the prosecution of the claim filed previous to reorganization proceedings was "inconsistent with those powers of exclusive management" (R. 65).

Specification of Errors

The Circuit Court of Appeals erred:

1. In affirming the order of the District Court holding that petitioner had no right to continue to prosecute the claim herein and disallowing the claim.

2. In holding, upon the objections of the respondents that all causes of action belonging to St. Louis Southwestern vested in the trustee of that company, that petitioner, a stockholder of St. Louis Southwestern, without any action on the part of said trustee to take over or restrain the prosecution of the claim, was precluded from continuing to prosecute the claim which was filed by him for the benefit of that company in the Rock Island reorganization proceedings previous to the institution of reorganization proceedings of St. Louis Southwestern.

3. In holding that, because under subsection (a) of Section 77 of the Bankruptcy Act the reorganization court is given "exclusive jurisdiction of the debtor and its property wherever located" and "in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a Federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose," on that account petitioner, after the institution of reorganization proceedings and the appointment of a trustee for St. Louis Southwestern, was precluded from continuing to prosecute the claim.

4. In holding that because under subsection (c)(2) of Section 77 the trustee of St. Louis Southwestern was given "all the title" and "all of the powers of a trustee appointed pursuant to Section 72 or any other section of this title [11 U. S. C. A.], and, to the extent not in-

consistent with this section, if authorized by the judge, the powers of a receiver in an equity proceeding," on that account petitioner was precluded from prosecuting the claim.

5. In failing to take into consideration subsection (*l*) of Section 77, which sets forth that in railroad reorganization proceedings "the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed," and by reason of the failure to do so, holding that petitioner was precluded from prosecuting the claim.

Summary of Argument

The claim was filed by petitioner in behalf of St. Louis Southwestern in the Rock Island reorganization proceedings previous to the initiation of proceedings for the reorganization of and the appointment of a trustee for St. Louis Southwestern. The trustee of St. Louis Southwestern made no step whatsoever to take over the claim or to enjoin its prosecution by petitioner.

The Circuit Court of Appeals held upon the objections of the respondents, trustees of Rock Island, that petitioner had no right to continue to prosecute the claim. The Court based its decision on subsections (a) and (c)(2) of Section 77 of the Bankruptcy Act. In so holding the Circuit Court of Appeals erred.

Under subsection (a) there is expressly conferred on the court exclusive jurisdiction of the debtor and its property wherever located, and the court is also authorized to exercise, in addition to the powers conferred by the section, "all the powers, not inconsistent with this section, which a Federal court would have had if it had appointed a re-

ceiver in equity of the property of the debtor for any purpose."

The appointment of a trustee in bankruptcy or of a receiver in equity does not abate a pending suit brought by the bankrupt or debtor.

Bankruptcy courts have always had exclusive jurisdiction over the debtor and its property wherever located.

Therefore, the express conferring upon the court of exclusive jurisdiction did not differentiate the law in reorganization proceedings from the law in a liquidating bankruptcy proceeding so as to preclude the continued prosecution of the claim.

The language conferring upon the court all the powers which a Federal court would have had if it had appointed a receiver in equity was not effective to do this. That language has been held to refer to the substantive powers which such a court exercises over the property in its custody when it appoints a receiver, rather than to its jurisdiction.

Subsection (a) should be read together with subsection *(l)* which states that "the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed."

The title and powers conferred upon the trustee under subsection (c)(2) do not preclude the continued prosecution of the claim. Under this subsection the trustee is given the title and consistently with the provisions of this section the powers of a trustee appointed pursuant to Section 72 (of 11 U. S. C. A.), and to the extent not inconsistent with this section, if authorized by the judge, the powers of a receiver in equity proceeding.

Inasmuch as Section 72 has to do with the ordinary liquidating bankruptcy, the trustee under subsection (c)(2) is not given any more title or powers than a trustee in bankruptcy. As to the powers of a receiver in equity, there is nothing to show that the St. Louis Southwestern reorganization court gave the trustee such powers.

Since neither the appointment of a trustee in bankruptcy nor of a receiver in equity precludes the continued prosecution of a claim under the circumstances of this case, giving the trustee under subsection (c)(2) such title and powers cannot affect the right of petitioner to continue to prosecute the claim.

The order of the St. Louis Southwestern reorganization court, denying petitioner's application for an order to show cause why an order should not be made permitting him to continue to prosecute the claim, does not preclude the prosecution of the claim by him.

The claim against the Rock Island is meritorious and substantial.

ARGUMENT

I

The appointment of a trustee in bankruptcy or of a receiver in equity does not abate a pending suit brought by the bankrupt or debtor.

If the trustee in a liquidating bankruptcy proceeding or the receiver in an equity receivership fails to take over or enjoin the prosecution of a suit brought or a claim filed previous to the commencement of the bankruptcy or receivership, it may not be pleaded as a defense that the appointment of the trustee or receiver precludes the continued prosecution of the suit or claim by the bankrupt or debtor.

(a) This is the rule as to bankruptcy proceedings:

Thatcher v. *Rockwell*, 105 U. S. 467, 470;
Johnson v. *Collier*, 222 U. S. 538, 540;
Paradise v. *Vogtländische Maschinen-Fabrik* (C. C. A. 3), 99 F. (2d) 53, 55;
Bluegrass Canning Co. v. *Steward* (C. C. A. 6), 175 Fed. 537, 543-544;
Van der Stegen v. *Neuss, Hesslein & Co.*, 270 N. Y. 55, 59-60;
Bennett v. *Associated Theaters*, 247 Mich. 493, 496;
Griffin v. *Mutual Life Ins. Co.*, 119 Ga. 664, 665.
See also Collier on Bankruptcy, 14th ed., vol. 1, pp. 1173, *et seq.*

(b) This is also the rule as to equity receiverships:

Boston Elevated Ry. Co. v. *Paul Boyton Co.* (C. C. A. 1), 211 Fed. 812, 822-823;
Missouri, K. & T. Trust Co. v. *German Nat. Bank* (C. C. A. 8), 77 Fed. 117, 122-123;
Hartford Accident & Indemnity Co. v. *Federal Bond & Mtge. Co.* (C. C. A. 8), 59 F. (2d) 950, 956;
Grimes Savings Bank v. *McHarg*, 217 Iowa 636, 640.

(a) *As to bankruptcy proceedings:*

In *Thatcher* v. *Rockwell*, 105 U. S. 467, plaintiff after bringing suit assigned the claim in suit and thereafter went into bankruptcy under the Bankruptcy Act of 1867. The assignees of the claim continued the suit in the name in which it had been brought. It was held that

the bankruptcy was not a bar to the suit. Chief Justice Waite stated (pp. 469-470):

> "The further charge of the court to the effect that if the assignee [in bankruptcy] expressly consented that the bankrupt might continue to prosecute the suit in his own name, the defendants could not avail themselves of the bankruptcy as a defence, was also right. * * * The true rule is stated in *Eyster* v. *Gaff*, 91 U. S. 521; *Burbank* v. *Bigelow*, 92 id. 179; *Norton* v. *Switzer*, 93 id. 355; *Jerome* v. *M'Carter*, 94 id. 734; *M'Henry* v. *La Société Française, &c.*, 95 id. 58; and *Davis* v. *Friedlander*, 104 id. 570. These cases, although the bankrupt happened to be a defendant, establish the doctrine that under the late bankrupt law the validity of a pending suit, or of the decree or judgment therein, was not affected by the intervening bankruptcy of one of the parties; that the assignee might or might not be made a party; and whether he was so or not, he was equally bound with any other party acquiring an interest *pendente lite*. It is no defence to the debt that the creditor has become a bankrupt; and if an assignee, after notice, permits a pending suit to proceed in the name of the bankrupt for its recovery, he is bound by any judgment that may be rendered. This is a sufficient protection for the debtor."

In *Johnson* v. *Collier*, 222 U. S. 538, the bankrupt, after filing a voluntary petition but before the appointment of the trustee, brought suit. The Court held that a suit begun even after the commencement of bankruptcy proceedings but before the appointment of a trustee may be continued after such appointment, in the absence of any action on the part of the trustee to enjoin its continued prosecution. After citing *Thatcher* v. *Rockwell*, Mr. Justice Lamar said (p. 540):

> "If, because of the disproportionate expense, or uncertainty as to the result, the trustee neither sues nor intervenes, there is no reason why the bankrupt himself should not continue the litigation. He has an interest in making the dividend for creditors as large

as possible, and in some states the more direct interest of creating a fund which may be set apart to him as an exemption. If the trustee will not sue and the bankrupt cannot sue, it might result in the bankrupt's debtor being discharged of an actual liability. The statute indicates no such purpose, and if money or property is finally recovered, it will be for the benefit of the estate. Nor is there any merit in the suggestion that this might involve a liability to pay both the bankrupt and the trustee. The defendant in any such suit can, by order of the bankrupt court, be amply protected against any danger of being made to pay twice."

In *Paradise* v. *Vogtlandische Maschinen Fabrik*, 99 F. (2d) 53, after a suit had been brought, the plaintiff was adjudicated a bankrupt and a trustee was appointed. The plaintiff continued the prosecution of the suit. The Court held (p. 55):

"It is settled that a pending action will not abate merely because of the bankruptcy of the plaintiff. Thatcher v. Rockwell, 105 U. S. 467, 26 L. Ed. 949; Hahlo v. Cole, 112 App. Div. 636, 98 N. Y. S. 1049; Griffin v. Mutual Life Ins. Co., 119 Ga. 664, 46 S. E. 870. • • • If the trustees decline or fail to prosecute the action the bankrupt may continue its prosecution to judgment. Bluegrass Canning Co. v. Steward, 6 Cir., 175 F. 537; Griffin v. Mutual Life Ins. Co., supra; Hahlo v. Cole, supra; Bennett v. Associated Theaters Corp., 247 Mich. 493, 226 N. W. 239."

In *Bluegrass Canning Co.* v. *Steward*, 175 Fed. 537, suit was begun by a corporation previous to bankruptcy. The Court said (pp. 543-544):

"Pending the suit below the canning company was adjudicated a bankrupt, and this fact was shown in the case. The creditors declined to prosecute the suit. The court below allowed the suit to go on in the name of the bankrupt upon the execution of a bond indemnifying the bankrupt against costs by J. E. Gunther, a surety upon the attachment bond, • • •

> and the motion to dismiss the suit because of the plaintiff's bankruptcy was denied. * * * The bankruptcy of the corporation did not dissolve it. 2 Clark & Marshall, Private Corporations, p. 863. While the bankrupt trustee may intervene and prosecute a pending suit if he will, yet, if he does not, we see no reason why the bankrupt may not go on with it if he wishes. Loveland on Bankruptcy (3d Ed.) page 428."

In *Van der Stegen* v. *Neuss, Hesslein & Co.*, 270 N. Y. 55, Chief Judge Crane, discussing the effect of the appointment of a trustee in bankruptcy upon a pending suit, said (pp. 59-60):

> "Again, the trustee in bankruptcy is not obliged to maintain or continue every cause of action which the bankrupt may have. He is not bound to accept burdensome property nor unprofitable contracts (*Atchison, T. & S. F. Ry. Co.* v. *Hurley*, 153 Fed. Rep. 503; affd., 213 U. S. 126), nor is he obliged to intervene in any action pending by or against the bankrupt. (*Kessler* v. *Herkoltz*, 132 App. Div. 278; *Fleming* v. *Courtenay*, 98 Me. 401). If a trustee does not take up the prosecution of a suit the defendant is not released even where the right of action is one that might have passed to the trustee. The bankrupt may continue the prosecution of the action. (*Griffin* v. *Mutual Life Ins. Co.*, 119 Ga. 664.)"

In *Bennett* v. *Associated Theaters*, 247 Mich. 493, the plaintiff became bankrupt after bringing an action. The defendant contended that the action could not be maintained since the plaintiff was not the real party in interest, title to the cause of action having vested in the trustee. The Court quoted section 11 (c) of the Bankruptcy Act and said (p. 496):

> "The intervention of the trustee is optional and subject to the direction of the court. The statute was evidently so enacted because it may not be for the best interest of the estate to incur the expense of prosecuting claims of doubtful value. Unless the trus-

tee intervenes, the bankrupt may continue prosecution of the action."

See also opinion of Lamar, J., subsequently of this Court, in *Griffin* v. *Mutual Life Ins. Co.*, 119 Ga. 664, at page 665, for a discussion of the law.

(b) *As to receivership proceedings:*

In *Boston Elevated Ry. Co.* v. *Paul Boyton Co.*, 211 Fed. 812, the defendant pleaded that after the suit had been begun a receiver was appointed for the plaintiff and that the plaintiff was without right to continue to prosecute the suit without leave of court. The Court held (p. 823):

"The suit did not abate by the appointment of a receiver for the plaintiff's rights of action while it was pending. The receiver had not asked to intervene, nor had the defendant moved to have him substituted as plaintiff. The question of his right to maintain the action, as receiver, in the jurisdiction of a court other than that of his appointment did not arise."

In *Missouri, K. & T. Trust Co.* v. *German Nat. Bank*, 77 Fed. 117, which was a suit by a bank which subsequently became insolvent, a motion was made by the defendant to have the receiver of the bank substituted as plaintiff. The Court said (pp. 122-123):

"This motion was denied, and an exception was taken by counsel for the trust company. • • • the denial of the motion is no ground for a reversal of the judgment which was subsequently rendered. The denial of the motion did not prejudice the rights of the trust company in any respect, and if the receiver desires to be substituted as a party plaintiff, so as to be in a position to control the judgment, on making a proper application to the circuit court he can still be made a party for the purpose above indicated."

In *Hartford Accident & Indemnity Co.* v. *Federal Bond & Mtge. Co.*, 59 F. (2d) 950, defendant moved to abate the action in case the receiver did not intervene. The motion was denied.

In *Grimes Savings Bank* v. *McHarg*, 217 Iowa 636, the Court said (at p. 640):

> "The rule is settled in this state that the mere appointment of a receiver long after an action has been commenced will not abate the prosecution of the action by the party for whom a receiver has been appointed."

The above cases clearly indicate that a corporation is not precluded from continuing a suit begun previous to the appointment of a trustee in bankruptcy or of a receiver in equity receivership proceedings.

In the application of this rule there is no valid reason for any distinction between a suit brought by a corporation and a suit brought by a stockholder for the benefit of his corporation, and the rule has been applied accordingly in stockholder's suits. *Friederich W. Meyer* v. *Page*, 112 App. Div. (N. Y.) 625; *McAnarney* v. *Lembeck*, 97 N. J. Eq. 361.

Nor in the application of the rule is there any ground for distinguishing between a claim filed in bankruptcy and a plenary suit.

II

Subsections (a) and (c)(2) of Section 77 of the Bankruptcy Act have not changed the law so as to preclude the continued prosecution of a suit begun or a claim filed previous to reorganization proceedings by a corporation or a stockholder for the benefit of his corporation.

(a) As to the exclusive jurisdiction of the reorganization court under subsection (a):

The Circuit Court of Appeals held that the jurisdiction and power conferred upon the reorganization court under

Section 77 of the Bankruptcy Act, including subsection (a) which confers upon the court "exclusive jurisdiction of the debtor and its property wherever located," serves to differentiate the law in reorganization proceedings from the law in the ordinary bankruptcy or equity receivership in such a way as to preclude the continued prosecution of the claim herein (R. 64).

Petitioner submits that in this the Circuit Court of Appeals erred. Neither the statute nor the decisions interpreting it furnish the slightest ground for the contention that the conferring upon the court of exclusive jurisdiction under subsection (a) or any other provision of the statute precludes the continued prosecution of a suit begun or a claim filed previous to reorganization proceedings.

Bankruptcy courts have always had exclusive jurisdiction of the property of the bankrupt wherever located. This appears from numerous decisions of this Court, handed down prior to the enactment of Section 77.

In *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734, an action was brought in a state court in Arkansas to foreclose a mortgage on property in Arkansas owned by the bankrupt. Proceedings in bankruptcy were pending in Texas. The bankrupt and trustee petitioned for the removal of the cause to the United States District Court for the Western District of Arkansas. After removal the trustee filed an answer setting up his possession and title as trustee, and that the bankruptcy court of Texas had exclusive jurisdiction to ascertain the facts and administer the property. The answer was stricken out and a decree of foreclosure and sale was entered. In reversing the judgment and remanding the proceedings to the District Court, the Supreme Court stated (pp. 737-738):

> "The title and right to possession of all property owned and possessed by the bankrupt vests in the trustee as of the date of the filing of the petition in

bankruptcy, no matter whether situated within or without the district in which the court sits. * * * It follows that the bankruptcy court has exclusive jurisdiction to deal with the property of the bankrupt estate. It may order a sale of real estate lying outside the district. * * * When this jurisdiction has attached the court's possession cannot be affected by actions brought in other courts. * * * This is but an application of the well recognized rule that when a court of competent jurisdiction takes possession of property through its officers, this withdraws the property from the jurisdiction of all other courts which, though of concurrent jurisdiction, may not disturb that possession; and that the court originally acquiring jurisdiction is competent to hear and determine all questions respecting title, possession and control of the property."

See also *United States Fidelity & G. Co.* v. *Bray*, 225 U. S. 205, 217; *Robertson* v. *Howard*, 229 U. S. 254, 260; *Gross* v. *Irving Trust Company*, 289 U. S. 342, 344.

Section 77 was enacted in 1933. The pertinent provision of subsection (a) as then enacted is as follows:

"If the petition is so approved, the court in which such order approving the petition is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located."

Subsection (*l*) of Section 77 (which was subsection (n) when the statute was passed in 1933), provides:

"In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed."

Subsection (a) should be read together with subsection (*l*). The statement that the rights "of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed" would indicate that it was the intention of Congress to guard against any misconstruction of the statute as to the jurisdiction and powers of the court.

In 1935 Section 77 was amended, Congress adopting recommendations contained in a report made in 1934 by the late Joseph B. Eastman, Federal Coordinator of Transportation (House Doc. 89, 74th Cong., 1st Sess.). Mr. Eastman referred to the enactment of Section 77B in 1934 stating that it was based "upon Section 77 but incorporated many minor changes" which "where appropriate should be adopted" (pp. 102-103).

Subsection (a) of Section 77B, in addition to language similar to the language of Section 77 as to exclusive jurisdiction, contained a provision giving to the court the powers of a Federal court which had appointed a receiver in equity of the property of the debtor.

In amending subsection (a) of Section 77 the court was given these powers of a Federal court which had appointed a receiver. It has been held that this reference "to the powers which a federal equity court exercises when it appoints a receiver is to the substantive powers which such a court exercises over the property in its custody rather than to its jurisdiction • • •" (*In re Standard Gas & Electric Co.*, 119 F. (2d) 658, at p. 662). As has been shown, the appointment of a receiver does not abate a pending suit by a corporation (pp. 9, 13-14, *supra*).

There were also added at this time the provisions which immediately follow, which were not in Section 77B, namely, "Process of the court shall extend to and be valid when served in any judicial district," and the provision for the promulgation by the Supreme Court of rules relating to the service of process outside the judicial district.

These provisions as to the extension and service of process have been construed to be procedural rather than jurisdictional (*Thompson* v. *Terminal Shares*, 104 F. (2d) 1, at p. 8).

In the pages that follow petitioner discusses the decisions of this Court and of other Federal courts interpreting subsection (a) of Sections 77 and 77B.

Many of the cited cases involved the question of the right of the trustee to take appropriate action, whether by injunction to protect the property of the corporation situated without the district, or by plenary suit to assert the rights of the corporation against non-residents served without the district. The facts in many of these cases are not similar to the facts in the instant case. These decisions, however, show how little change was effected in the jurisdiction of the court by the enactment of Section 77.

One of the chief purposes of the enactment of Section 77, as appears from the debates in Congress, was to do away with the delays and other disadvantages of ancillary proceedings and the many other abuses of equity receiverships (76 Cong. Rec. 2927, 4887, 5358), and it has been in accordance with that purpose that this Court and other courts, as appears from these cases, have interpreted the Act.

In *Ex Parte Baldwin*, 291 U. S. 610, after the enactment of subsection (a) of Section 77 in its original form, the Supreme Court discussed at length (pp. 615, *et seq.*) the jurisdiction of the reorganization court.

In that case the trustees of the Missouri Pacific Railroad System, in reorganization in Missouri under Section 77, petitioned the Supreme Court for a writ of mandamus to compel the Federal court for Southern Texas, upon their petition for removal, to take jurisdiction of

a suit brought against them in a Texas state court. In holding that the existence of a remedy by injunction of the court in which proceedings for reorganization were pending against the prosecution of the suit in the state court required the denial of the petition for mandamus, the Supreme Court stated that a bankruptcy court had exclusive jurisdiction, and that it could not only issue all writs necessary to protect its possession from physical interference, but was entitled to determine all questions respecting the same; that the jurisdiction was exclusive of the jurisdiction of other courts, and this "regardless of whether the property is located in the district in which the bankruptcy proceeding originated."

The Court did not specifically refer to the language in subsection (a). As in *Isaacs* v. *Hobbs Tie & Timber Co., supra,* it rested its argument upon the principle that where a court of competent jurisdiction takes property into its possession, such property is thereby withdrawn from the jurisdiction of other courts (p. 615).

In *Continental Ill. N. B. & T. Co.* v. *Chicago, R. I. & P. R. Co.,* 294 U. S. 648, the Supreme Court construed subsection (a) without the amendments. In that case the District Court enjoined the holders of collateral notes secured by bonds issued by Rock Island from selling any of the collateral. The assets that it was sought to safeguard by injunction were conceded assets of the debtor's estate. The territorial jurisdiction of the reorganization court was assailed by certain of the defendants on the ground that they had been served outside the district.

In holding that the injunction could issue the Court referred to the "exclusive jurisdiction" of the reorganization court under subsection (a) "of the debtor and its property wherever located", and to the fact that "Section 77 deals with railway corporations whose lines and activities are not confined to a single district or a

single state, but in numerous instances reach into many districts and many states" (p. 683). The Court pointed out that the usefulness of the section would be impaired if the court could not send its process into any state when necessary. The Court said (p. 683):

> "As has already been shown, the equity in the collateral remaining in the railroad company is property; and over this property, wherever located, the federal district court is given exclusive jurisdiction by the precise language of § 77, just quoted. As a necessary consequence of that jurisdiction, the court must have the power to preserve and safeguard the property for the benefit of the trust estate so far as that is compatible with the rights of the pledgees. Jurisdiction over the property wherever located carries with it jurisdiction to enjoin, in a proper case, interferences with the property, and this includes, by necessary inference, the power to send process to that end for service upon the persons to be enjoined wherever they may be found within the United States."

Some years after the enactment of subsection (a) of Section 77 with its amendments, the Supreme Court in *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478, again discussed the meaning of exclusive jurisdiction in a railroad reorganization case (p. 483). It cited *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734, *supra*, but made no reference to the language of subsection (a).

Subsection (a) in its amended form was construed in *Thompson* v. *Terminal Shares* (C. C. A. 8), 104 F. (2d) 1, cert. denied 308 U. S. 559.

The question there involved was whether the railroad reorganization court had jurisdiction to entertain a suit against non-resident defendants, involving property outside the district held adversely to the bankrupt estate. It was held that the court was without power to do so.

The Court held, Judge Sanborn writing, that the jurisdiction conferred by Section 77 was to be considered "the traditional jurisdiction" of the bankruptcy court "over the property of a bankrupt, wherever located, freed, however, from those limitations which made ancillary proceedings in other districts necessary, and with the powers which Federal equity courts exercise in receivership proceedings, so far as those powers may be necessary or appropriate in order to preserve and safeguard the property in the actual or constructive possession of debtors and in order to carry on their business pending reorganization" (p. 9).

The discussion in that case of the legislative history of subsection (a) is of particular interest.

Judge Sanborn pointed out that while the *Continental Illinois National Bank & Trust Co.* case (*supra*) was pending in the Supreme Court, there being doubt as to the decision, the provision was added which gave the court the powers "not inconsistent with this section, which a Federal court would have had if it had appointed a receiver in equity," and also the provisions rendering the process of the court valid in jurisdictions outside the reorganization court district.

Referring to the report of Mr. Eastman on which the amendments to Section 77 were based, Judge Sanborn stated that that report nowhere contained any suggestion that "the proposed amendments relating to jurisdiction were intended to confer any additional powers upon the courts of bankruptcy with respect to the reorganization of railroads" (p. 7).

It is apparent from the above decisions that the language of subsection (a) worked no such radical modification in the jurisdiction hitherto exercised by the bankruptcy court as would appear from the opinion of the Circuit Court of Appeals herein.

(b) As to the title and powers conferred on the trustee under subsection (c) (2):

In addition to subsection (a), the Circuit Court of Appeals herein also relied on subsection (c)(2) of Section 77, to the effect that the trustee "shall have all the title and shall exercise * * * all of the powers of a trustee appointed pursuant to section 72* or any other section of this title [11 U. S. C. A.], and, to the extent not inconsistent with this section, *if authorized by the judge*, the powers of a receiver in an equity proceeding."

Section 72 (of 11 U. S. C. A.) has to do with the appointment of trustees in ordinary bankruptcy proceedings. The trustee under Section 77 by these words is thus given no more title or power than has a trustee in the ordinary bankruptcy proceeding.

Furthermore, subsection (c) (2), as well as subsection (a), should be read together with subsection (*l*) *of* Section 77, which provides that, consistently with the provisions of that section, the rights "of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed."

As to "the powers of a receiver in an equity proceeding" "to the extent not inconsistent with this section," which, as appears from the above language of the statute, it is left entirely to the discretion of the judge to withhold from or to confer upon the trustee, there is nothing in the record to show that the reorganization court gave such powers to the St. Louis Southwestern trustee.

Moreover, inasmuch as neither the appointment of a trustee nor of a receiver precludes the continued prosecution of a suit under the circumstances of this case (see pp. 8-14, *supra*) it follows that giving to the trustee in a Sec-

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* Section 72 of 11 U. S. C. A. is reproduced in full in the Appendix, pages 41-42.

tion 77 proceeding all the powers of a trustee appointed pursuant to Section 72 and all the powers of a receiver in an equity proceeding, in no way affects the right of petitioner to continue to prosecute the claim.

(c) As to corresponding subsections of Section 77B.

Section 77B contained language similar to that in Section 77 (a), (c)(2) and (*l*) herein discussed, the corresponding subsections of Section 77B being (a), (c)(2) and (o).* The substance of these provisions of former Section 77B is retained in Chapter X of the Bankruptcy Act (See Sections 111, 115, 186, 187, 112, 114 and 200.)*

The language in Section 77B as to the jurisdiction of the court was construed in *In re Prudence Bonds Corp.* (C. C. A. 2), 75 F. (2d) 262, 263; *In re Prudence Co.* (C. C. A. 2), 96 F. (2d) 157, 159, cert. denied 305 U. S. 616; *United States* v. *Tacoma Oriental S. S. Co.* (C. C. A. 9), 86 F. (2d) 363, 368; and *In re Standard Gas & Electric Co.* (C. C. A. 3), 119 F. (2d) 658, 661.

In the *Prudence Bonds Corp.*, the *Tacoma* and the *Standard Gas* cases, the Court also made specific reference to subsection (o), corresponding to subsection (*l*) of Section 77, and stated that subsection (a) is to be read together with subsection (o). While no reference was made to subsection (c)(2), which contained language similar to Section 77 (c)(2), surely this subsection, in view of the issues passed upon, could not have escaped the notice of the Court.

In *In re Prudence Bonds Corp.*, 75 F. (2d) 262, after the appointment of trustees of the Prudence Corporation under Section 77B, a holder of a Prudence note filed a suit in a state court against the indenture trustee for an accounting of income from the pledged mortgages. The

* Reprinted in the Appendix, pages 39-41.

reorganization court stayed the prosecution of the suit on the petition of the indenture trustee. The Circuit Court of Appeals for the Second Circuit, consisting of Judges Learned Hand, Swan and Chase, in upholding the stay, discussed the language in Section 77B (a) as to exclusive jurisdiction and also Section 77B (o) and stated (p. 263):

> "It is clear both from the language used in these subdivisions, and from the consequences of a contrary ruling, that Congress did not intend the bankruptcy court in proceedings under Section 77B to take over all litigation between the debtor and third persons."

Later, in *In re Prudence Co.*, 96 F. (2d) 157, the Circuit Court of Appeals for the Second Circuit allowed a pending suit to be continued after the appointment of the trustees. The matter came up before Judges Manton, Swan and Chase, two of whom, as has been indicated, participated in the decision in *In re Prudence Bonds Corp., supra.* The trustees had proposed that the attorney who acted for the bankrupt become their attorney and continue the litigation, his compensation to be determined by the bankruptcy court. This proposal the attorney declined to accept, continuing the litigation in the name of the corporation on the basis of his original retainer. The Circuit Court (p. 159) held that the filing of the petition did not terminate his employment nor stay the pending suit; that while under 11 U. S. C. A., Section 29 (c), the trustees had the right to take over the prosecution of the suit, they also had the right to allow the suit to be continued by the bankrupt and later claim the fruits of any recovery. The Court continued:

> "In the case at bar the debtor's trustees chose the latter course. They did not intervene in the pending suit, nor employ Mr. Davison as their attorney; they merely allowed him to perform his contract of retainer with the debtor."

In *United States* v. *Tacoma Oriental S. S. Co.*, 86 F. (2d) 363, the appeal was from an order of the bankruptcy court in a proceeding under Section 77B ordering the Government to pay to the appellees revenues earned under an ocean mail contract. The Secretary of the Treasury and the other Government officials served, moved that the petition be dismissed on the ground that they were residents of the District of Columbia and that they had not been served within the Western District of Washington, where the proceeding had been brought.

The Court expressed the opinion (at p. 367) that the provision in subsection (a) of Section 77, giving the court the powers which a Federal court has in appointing a receiver in equity, in view of the fact that it was limited in its operation by the words "not inconsistent with this section," read together with the provision in subsection (o) under which the court is given the powers of a court of bankruptcy with a similar limitation upon this power, narrowed the question to whether under the provision as to exclusive jurisdiction the lower court had jurisdiction to issue its process outside the district. The Court reversed the order of the lower court, stating (p. 368):

> "We believe that the act giving exclusive jurisdiction of the lower court over the debtor's property wherever located simply means that the res (the debtor's property) is to be considered solely under the jurisdiction of the lower court. Any wrongful invasion, interference, or disposition of that res is to be dealt with solely by the lower court. Jurisdiction over a person outside the lower court's jurisdiction is given to the lower court, only if such person is in some manner invading, interfering, or disposing of the debtor's res, and then only to the extent of preventing or forestalling the invasion, interference or disposition of such res. The act gives no jurisdiction to the trial court to issue its process outside its district in proceedings purely in personam, in which no protection of the debtor's res is involved."

In *In re Standard Gas & Electric Co.*, 119 F. (2d) 658, the trustee in reorganization proceedings under Section 77B brought suit in the District Court against a number of persons for damages arising out of the control exercised by them over the debtor. The resident defendants moved to dismiss on the ground that the court did not have subject-matter jurisdiction; the non-resident defendants on the ground that they had been served outside the district. The Circuit Court of Appeals, in affirming the order of the lower court dismissing the complaint said (at p. 661):

> "* * * The grant of exclusive jurisdiction over the debtor and its property was not a departure from established bankruptcy practice. The Bankruptcy Act * * * from the time of its enactment had conferred upon courts of bankruptcy exclusive jurisdiction over bankrupts and their property. * * *
>
> "In section 77B Congress likewise did not by any express language confer broad jurisdiction over claims by a debtor or its trustee against third persons. We think that such jurisdiction is not to be implied from the grant of jurisdiction over the debtor's property, but that the latter jurisdiction is essentially similar in nature to that possessed by courts of bankruptcy over the property of bankrupts."

As to the purpose of Section 77B the Court said (p. 662):

> "It was to eliminate the necessity for * * * expensive and time consuming ancillary proceedings that Congress conferred upon the reorganization court jurisdiction over the debtor's property 'wherever located.'"

The decision of the Circuit Court of Appeals for the Second Circuit in *Meyer* v. *Kansas City Southern*, a suit brought by this petitioner as a stockholder of St. Louis Southwestern for the benefit of that company, supports the position taken by him herein. In that case the Dis-

trict Court for the Southern District of New York on September 6, 1935, dismissed the complaint, not on the merits but on the ground that the court did not have subject matter jurisdiction. St. Louis Southwestern filed its petition for reorganization on December 12, 1935, and a trustee was appointed on January 3, 1936 (R. 50). The Circuit Court of Appeals in its decision, rendered on June 22, 1936, referred to the appointment of a trustee of St. Louis Southwestern (p. 414), but did not suggest that such appointment abated the representative action brought by petitioner and thus prevented the prosecution of the appeal. *Meyer* v. *Kansas City Southern* (C. C. A. 2), 84 F. (2d) 411, aff'g 11 F. Supp. 937, cert. denied 299 U. S. 607.*

The decision herein is in conflict with decisions of the Circuit Court of Appeals for the Second Circuit, as appears from the two *Prudence* cases above discussed and from *Meyer* v. *Kansas City Southern*.

(d) *The decision of the Circuit Court of Appeals.*

The Circuit Court of Appeals was under a misapprehension in stating that petitioner contended that, because "the procedure in interstate railroad reorganization under § 77 is substantially that of an equity receivership, the appointment of the trustee did not prevent the continued prosecution" of the claim herein (R. 63). Such was not petitioner's contention. Nor did petitioner cite the cases there listed in the margin in support of that contention. Petitioner's contentions before the Circuit Court and the cases cited by him in support thereof do not differ from those set forth in this brief, save that in this brief he has cited some additional cases.

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* Though it does not appear in the record herein, the fact is that after the appointment of the trustee the St. Louis Southwestern moved to stay the appeal. The Circuit Court of Appeals refused to grant the stay. The appeal was argued May 20, 1936.

As has been shown, where suits have been begun before the appointment of a trustee or receiver the courts have not allowed a defendant to plead the appointment of the trustee or receiver as a defense.

Johnson v. *Collier*, 222 U. S. 538, previously discussed (pp. 10-11), has not the limited applicability claimed for it by the Circuit Court of Appeals (R. 63). On the contrary, that case is a reaffirmation and extension of the rule laid down in *Thatcher* v. *Rockwell*, 105 U. S. 467, so as to include within the rule not only suits brought previous to the filing of the petition but also suits brought after the filing of the petition and up to the time of the appointment of the trustee.

In its discussion of *In re Prudence Bonds Corp.*, 75 F. (2d) 262, *supra*, the Circuit Court of Appeals (R. 63-64) fails to bring out that the stay in that case was granted by the *reorganization* court on the ground that the suit would interfere with its disposition of the estate.

The St. Louis Southwestern reorganization court has not enjoined the continued prosecution of the claim. The prosecution of the claim will in no way interfere with the St. Louis Southwestern reorganization proceedings, nor has there been any suggestion that it will do so.

Petitioner in his brief submitted to the Circuit Court of Appeals did not cite *Thompson* v. *Terminal Shares*, 104 F. (2d) 1, because of the similarity to the facts in the instant case, but in order to show the very limited extent by which the jurisdiction of the court was enlarged by the enactment of subsection (a) as amended (see this brief, pp. 20-21, *supra*).

Porter v. *Sabin*, 149 U. S. 473; *Klein* v. *Peter*, 284 Fed. 797; and *Kelly* v. *Dolan*, 233 Fed. 635, cited by the Circuit Court of Appeals herein (R. 65), were all cases where a stockholder brought suit *after* the appointment

of a receiver for the corporation. *Reagan* v. *Midland Packing Co.*, 8 F. (2d) 954, also cited by the Court (R. 65), was a case where a judgment-creditor of a corporation brought suit *after* a receiver had been appointed.

The Circuit Court cites *Adler* v. *Seaman*, 266 Fed. 828, and *Seaman* v. *McCulloch*, 8 F. (2d) 820, as indicating the necessity of the court's passing upon "the desirability of proceeding with the suit" (R. 65).

As appears from the decision in *Adler* v. *Seaman*, while a stockholder's suit was pending in the District Court, seeking the appointment of a receiver of the corporation and injunctive relief against the directors, a bondholder brought suit in the same court also asking for the appointment of a receiver. The company contested the stockholder's suit, but consented to the appointment of a receiver in the bondholder's suit. The District Court allowed the two suits to be consolidated. The Circuit Court of Appeals reversed on the ground that the consolidation was improper.

In *Seaman* v. *McCulloch*, the Circuit Court, stating (p. 826) that the recovery sought in the stockholder's action was involved with certain power contracts and that the receiver's "functioning might be vitally affected by the disposition of these contracts," upheld the order of the lower court dismissing the representative action. The Court stated that the appointment of the receiver "did not *ipso facto et eo instanti*, abate" the stockholder's action.

The facts in the *Seaman* cases differ from the facts in this case. The claim herein was filed by petitioner, not in the St. Louis Southwestern reorganization court but in the Rock Island reorganization court, and is for the benefit of St. Louis Southwestern. Its continued prosecution would not interfere in any way with the functioning of the trustee of St. Louis Southwestern.

(e) Practical considerations underlying the rule.

The rule which permits the continued prosecution of a suit or claim under the circumstances previously outlined is supported by practical considerations. The trustee or receiver in equity has the power to take over the prosecution of the suit or claim, but he may choose not to do so. This may be because he believes that the chances of success are not good and he does not desire to incur the expense of what he considers will be fruitless litigation (*Johnson* v. *Collier*, 222 U. S. 538, at p. 540; *Paradise* v. *Vogtlandische Maschinen-Fabrik*, 99 F. (2d) 53, at p. 55); or for other reasons (*In re Prudence Co.*, 96 F. (2d) 157; *Bluegrass Canning Co.* v. *Steward*, 175 Fed. 537).

Often the trustee may not have the intimate knowledge of the facts or the zeal and persistence necessary for the successful prosecution of arduous litigation, or he may be reluctant to undertake litigation against those connected with the management of the corporation or others. Such a trustee may not be willing expressly to authorize the continued prosecution of a suit by the corporation or a stockholder; yet he may also be unwilling to take the responsibility of restraining its prosecution.

Under the rule that has hitherto prevailed, as has been brought out, causes of action constituting valuable assets, which would otherwise be lost, are thus preserved. In the event of a recovery, all the benefits accrue to the bankrupt estate or corporation in receivership and this without the trustee or receiver incurring the often heavy burden and expense involved in the conduct of the litigation.

III

The order of the St. Louis Southwestern reorganization court denying petitioner's application for an order to show cause does not preclude the prosecution of the claim.

Respondents have filed with this Court a certified copy of a certain order entered by Judge Moore of the St. Louis Southwestern reorganization court on February 28, 1944, denying petitioner's application for an order to show cause why an order should not be made permitting him to continue to prosecute the claim filed by him in the Rock Island reorganization proceedings. The said order of Judge Moore forms part of the papers in respondents' motions dated February 8, 1945, to dismiss petitioner's appeal to the Circuit Court of Appeals and for leave to supplement the record in that court.

Respondents could have had the papers on these motions, which included the order of Judge Moore, made part of the printed record herein. They failed to have this done.

Petitioner does not regard these moving papers as relevant to the question presented to this Court. Inasmuch, however, as respondents in their brief in opposition to the petition for certiorari have referred to said motions and apparently attach great importance to the said order, petitioner filed a certified copy of said motion papers in this Court, and reproduced a copy thereof in the appendix to his reply brief in support of his petition. The papers are as follows:

(1) Respondents' motion to dismiss the appeal and motion for leave to supplement the record, including the

said order of Judge Moore; (2) order of the Circuit Court of Appeals of February 15, 1945, denying the motion to dismiss with leave to renew; (3) petitioner's answer dated May 3, 1945, to said motions.

Respondents in their brief of April 5, 1945, submitted to the Circuit Court of Appeals, renewed their motions, but there was no further order by the Court thereon, nor did the Court in its opinion mention the order of Judge Moore, thus called to its attention.

As shown on its face, the order in question is an order denying an application for an order to show cause. The purpose of such an application, it is unnecessary to state, is to shorten the time in which a motion under the rules must be made returnable. A denial of such an application is not a denial of the motion which it is sought to bring on in this way.

As appears from his answer to respondents' motion to dismiss the appeal, petitioner in New York was informed over the telephone by his local counsel in St. Louis that upon the argument of the order to show cause the point was raised by the trustee of St. Louis Southwestern that petitioner had unduly delayed making his application. This apparently was the reason for the denial of the application.

But even assuming that there had been a motion duly noticed and a decision had been rendered on the merits (which was not the case), such a denial would not have constituted a stay and would not affect the question presented to this Court.

The fact that the claim against Rock Island has been formally called to the attention of the St. Louis Southwestern trustee by the application for the order to show cause would indicate this at least, however,—that the trus-

tee had given consideration to the causes of action set forth in the claim and had deliberately chosen neither to take over the claim, nor, on the other hand, to take steps to restrain its continued prosecution by petitioner.*

IV

The claim against Rock Island is meritorious and substantial.

The Special Master was not requested to submit a report on the merits of the claim. This appears from his report in which he states (R. 34):

> "The trustees of the debtor filed supplemental objections urging that Meyer had no standing to continue prosecution of the claim herein in view of the appointment of the trustee for St. Louis Southwestern. I have been requested to submit a report on that question before going into a hearing on the merits of the claim. This report accordingly deals with that question."**

Nevertheless, the Special Master in his report (R. 34-36) and his supplemental report (R. 46-47) discusses the merits of the claim.

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* It appears from the opinion of the District Court in *In re St. Louis Southwestern Ry. Co.*, 53 F. Supp. 914 (confirming the report of the Commission in *St. Louis S. W. Ry. Co. Reorganization*, 249 I. C. C. 5), that the trustee of St. Louis Southwestern made an investigation of petitioner's charges. The trustee found no basis for the institution of proceedings against the parties accused (pp. 924, 926). Though it is not shown by the record in this case, the proof of claim filed in the Rock Island reorganization proceedings was placed in evidence in the hearings in the St. Louis Southwestern reorganization proceedings before the District Court (Exhibit 146).

** The Circuit Court of Appeals was under a misapprehension, as it thus appears, when it stated that the Special Master had "heard the evidence and filed his report" (R. 62). There was no hearing whatsoever before the Special Master.

The Circuit Court of Appeals quotes the report of the Special Master to the effect "that claimant had filed a petition before the Interstate Commerce Commission in the reorganization proceedings involving St. Louis [Southwestern] based upon the allegations set forth in the claim filed in the case before us; and that the Commission had found that there was not sufficient evidence of a claim against the debtor to justify an investigation" (R. 62).

Petitioner discusses briefly some of the facts which are indicative of the meritorious and substantial nature of the claim.

The Interstate Commerce Commission, it is true, found that an investigation was not justified. Chairman Eastman, however, in a strong dissent indicated that he was of the opinion that petitioner in the said hearings before the Commission had to a large extent sustained the charges in his petition for investigation. He expressed the belief that the Commission should have granted the petition for investigation (R. 17). Referring to the part played by Rock Island in the undoing of St. Louis Southwestern, the Chairman stated that the downfall of that road began when Rock Island first acquired a dominant stock interest in the property in March, 1925 (R. 17).

After the report of the Commission, extended hearings were held before Judge Davis of the District Court in October and November 1942 upon objections raised to the plan of reorganization. Before any decision had been rendered, Judge Davis passed away and Judge Moore succeeded him in the case.

In the decision of the District Court confirming the report of the Commission, *In re St. Louis Southwestern Ry. Co.*, 53 F. Supp. 914, the Court held, at page 927, that "the validity of Meyer's charges of bad faith" was a matter "requiring study by experts on railroad affairs, involving, as they do, expert analysis of traffic movements,

freight loadings, financial statements, and other data peculiarly within the comprehension of the I. C. C. We are of the opinion that the Commission has had full opportunity to pass on these matters and exercise informed judgment. We are, therefore, not disposed to refer the plan back to the Commission on this account and, accordingly, overrule Meyer's objections to the plan of reorganization."

In his appeal from the decision of the District Court to the Circuit Court of Appeals for the Eighth Circuit, petitioner has taken the position that the report of the Commission is of a highly arbitrary nature and is contrary to the proof in the record, and that Judge Moore gravely erred in failing to evaluate either the proof placed in the record before the Commission or the large amount of additional proof placed in the record in the hearings before Judge Davis. Indeed the important proof placed in the record in the hearings before Judge Davis has thus not been considered either by the Interstate Commerce Commission or by the District Court.

The Department of Justice has shown that it is not in accord with the findings of the majority report of the Commission. In March 1945 the Government, through its Attorney General, filed a brief as *amicus curiae* in the appeal from the decision of the District Court. In its brief the Government asked that the claim of Southern Pacific as a creditor in the principal amount of $17,882,250, and as a stockholder owning 87% of the stock of St. Louis Southwestern, be subordinated to the interest of the minority stockholders on the ground that the control exercised by Kansas City Southern over St. Louis Southwestern was unlawful, and "that the debtor had a valuable cause of action for triple damages under the antitrust laws which it was prevented from bringing during its subsequent control by Southern Pacific." Rock Island was a co-conspirator with Kansas City Southern and others in the

illegal control exercised over St. Louis Southwestern by Kansas City Southern referred to in the Government's brief, and petitioner so alleged in the claim filed herein.

The suit instituted by the Government on August 23, 1944, against forty-seven Class I railroads owning lines west of the Mississippi, two important banking houses and others, charged a conspiracy of a far-reaching nature, as appears from the Government's complaint in that suit together with the "Western Agreement" annexed as an exhibit. Union Pacific, Southern Pacific, Kansas City Southern, Missouri-Kansas-Texas, the trustees of Rock Island and the St. Louis Southwestern trustee are joined as defendants. The violations of the Sherman Antitrust Act charged are alleged to have continued at least up to the time of the filing of the complaint. These violations include not only a conspiracy to keep up rates, but also nineteen other offenses. The Rock Island and the St. Louis Southwestern and their respective trustees, petitioner avers, were involved in these violations. The failure of Southern Pacific to carry out its contractual obligations to St. Louis Southwestern and to take various other steps in the development of St. Louis Southwestern, petitioner is convinced, resulted in part from the illegal combination charged.

The Government's suit is referred to in petitioner's answer to respondents' motions to dismiss the appeal and to supplement the record, reproduced in the appendix (pp. 32-33) to petitioner's reply brief in support of petition for writ of certiorari.

The facts revealed by the Government's suit were regarded by petitioner as constituting newly discovered evidence of the utmost importance and relevancy to his charges of conspiracy by which St. Louis Southwestern was controlled, its assets wasted and its earnings impaired. He therefore moved before the Circuit Court

of Appeals for the Eighth Circuit in December, 1944 that the St. Louis Southwestern proceedings be remanded to the District Court with instructions to remand to the Interstate Commerce Commission in order that the Commission might decide whether to institute an investigation into the facts alleged by the Government in its said suit.

On the argument, the Court ruled that the submission of the motion be set aside without prejudice and be heard in connection with the hearing upon the merits of the appeals. The appeals together with said motion were argued on April 6 and 7, 1945, and are now being considered by the said Circuit Court of Appeals.

CONCLUSION

It is submitted that the judgment of the Circuit Court of Appeals for the Seventh Circuit should be reversed and the cause remanded to that Court with appropriate instructions.

Respectfully submitted,

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Attorneys for Petitioner.

Dated: December 10, 1945.

Appendix

The pertinent provisions of Section 77 of the Bankruptcy Act (11 U. S. C. A. 205) are as follows:

"(a) * * * If the petition is so approved, the court in which such order is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a Federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose. Process of the court shall extend to and be valid when served in any judicial district. The Supreme Court of the United States shall promulgate rules relating to the service of process outside of the district in which the proceeding is pending, and any other rules which it may deem advisable in order to aid district courts and circuit courts of appeal in exercising the jurisdiction herein conferred upon them. * * *",

"(c)(2) * * * The trustee or trustees so appointed, upon filing such bond, shall have all the title and shall exercise, subject to the control of the judge and consistently with the provisions of this section, all of the powers of a trustee appointed pursuant to section 72 or any other section of this title, and, to the extent not inconsistent with this section, if authorized by the judge, the powers of a receiver in an equity proceeding, and, subject to the control of the judge and the jurisdiction of the Commission as provided by chapter 1 of Title 49 as on August 27, 1935, or thereafter amended, the power to operate the business of the debtor. * * *"

"(*l*) In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of

the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed."

The corresponding provisions of Section 77B of the Bankruptcy Act (11 U. S. C. A. 207) were as follows:

"(a) * * * If the petition or answer is so approved, an order of adjudication in bankruptcy shall not be entered and the court in which such order approving the petition or answer is entered shall, during the pendency of the proceedings under this section, have exclusive jurisdiction of the debtor and its property wherever located for the purposes of this section, and shall have and may exercise all the powers, not inconsistent with this section, which a Federal court would have had it appointed a receiver in equity of the property of the debtor by reason of its inability to pay its debts as they mature. * * *"

"(c)(2) * * * every such trustee, upon filing such bond, shall have all the title and shall exercise, subject to the control of the judge and consistently with the provisions of this section, all the powers of a trustee appointed pursuant to section 72 of this Act, and if authorized by the judge, the same powers as those exercised by a receiver in equity to the extent consistent with this section, and, subject to the authorization and control of the judge, the power to operate the business of the debtor during such period, fixed or indefinite, as the judge may from time to time prescribe;"

"(o) In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect

to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition or answer was approved."

The corresponding provisions of Chapter X of the Bankruptcy Act (Sections 111, 115, 186, 187, 112, 114, 200) (11 U. S. C. A. 511, 515, 586, 587, 512, 514, 600) are as follows:

§ 511. *Exclusive jurisdiction over debtor and property.* Where not inconsistent with the provisions of this chapter, the court in which a petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and its property, wherever located.

§ 515. *Jurisdiction as in insolvency.* Upon the approval of a petition, the court shall have and may, in addition to the jurisdiction, powers, and duties hereinabove and elsewhere in this chapter conferred and imposed upon it, exercise all the powers, not inconsistent with the provisions of this chapter, which a court of the United States would have if it had appointed a receiver in equity of the property of the debtor on the ground of insolvency or inability to meet its debts as they mature.

§ 586. *Trustee; title.* A trustee, upon his appointment and qualification, shall be vested with such title as a trustee appointed under section 72 of this title would have.

§ 587. *Same; rights, powers and duties.* Where not inconsistent with the provisions of this chapter, a trustee, upon his appointment and qualification, shall be vested with the same rights, be subject to the same duties, and exercise the same powers as a trustee appointed under section 72 of this title, and, if authorized by the judge,

shall have and may exercise such additional rights and powers as a receiver in equity would have if appointed by a court of the United States for the property of the debtor.

§ 512. *Matters prior to approval of petition; jurisdiction, powers and duties.* Prior to the approval of a petition, the jurisdiction, powers, and duties of the court and of its officers, where not inconsistent with the provisions of this chapter, shall be the same as in a bankruptcy proceeding before adjudication.

§ 514. *Matters upon approval of petition; jurisdiction, powers, and duties.* Upon the approval of a petition, the jurisdiction, powers, and duties of the court and of its officers, where not inconsistent with the provisions of this chapter, shall be the same as in a bankruptcy proceeding upon adjudication.

§ 600. *Rights, duties, and liabilities of creditors, etc.* Where not inconsistent with the provisions of this chapter, the rights, duties, and liabilities of creditors and of all other persons with respect to the property of the debtor shall be the same, before the approval of the petition, as in a bankruptcy proceeding before adjudication and, upon the approval of the petition, as in a bankruptcy proceeding upon adjudication.

Section 44 of the Bankruptcy Act (11 U. S. C. A. 72) reads as follows:

"(a) The creditors of a bankrupt, exclusive of the bankrupt's relatives or, where the bankrupt is a corporation, exclusive of its stockholders or members, its officers, and the members of its board of directors or trustees or of other similar controlling bodies, shall, at the

first meeting of creditors after the adjudication, or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, appoint a trustee or three trustees of such estate. If the creditors do not appoint a trustee or if the trustee so appointed fails to qualify as herein provided, the court shall make the appointment. If the bankrupt is a face-amount certificate company, as defined in section 80a—4 of Title 15, the court alone shall make the appointment; but the court shall not make such appointment without first notifying the Securities and Exchange Commission and giving it an opportunity to be heard.

"(b) Such creditors may, at their first meeting, also appoint a committee of not less than three creditors, which committee may consult and advise with the trustee in connection with the administration of the estate, make recommendations to the trustee in the performance of his duties and submit to the court any question affecting the administration of the estate.

"(c) An attorney shall not be disqualified to act as attorney for a receiver or trustee merely by reason of his representation of a general creditor."